

**COMMUNICATION TO THE AARHUS CONVENTION'S
COMPLIANCE COMMITTEE – (ACCC/C/2010/60)**

**RESPONSE TO ANSWERS FROM THE UNITED KINGDOM DATED 31 JULY
2012 REGARDING APPLICATIONS (ACCC/C/2010/45) and (ACCC/C/2010/60)**

Regarding the response letter dated 31 July 2012 from DEFRA, the Communicant makes the following observations by way of Response thereto.

(1.) Please provide a short description (as explained at the hearing) of the procedure available at the Secretary of State and the Independent Inspector and how they are related

1. Regarding the procedures relating to appeals by Applicants to the Secretary of State and the Independent Inspector, the Communicant agrees fully with the answers given by DEFRA.
2. The Communicant however contends that these procedures again reinforce and illustrate how the appeal procedure for Applicants differs from the extremely restricted *régime* for review of environmental decisions afforded at present to third parties by way of Judicial Review etc.
3. As is accepted by DEFRA, appeals to the Secretary of State and the Independent Inspector enjoy a complete rehearing of the issues considered by the local authority, either on the papers by a Planning Officer or before a local authority planning committee.
4. There is also full access to documents, and full opportunities for third parties to cross examine witnesses for the Applicant, and to call their own witnesses relating to factual issues and issues requiring expert evidence etc.
5. In addition, the Planning Inspector, either acting on his own or on behalf of the Secretary of State where he takes the final decision personally, has full powers to make findings of fact and value judgments on all of the issues arising, both of law and application of planning policies and factual issues and matters of value judgment.
6. This is fully illustrated by the examples sent to the Committee by the Applicant in support of application ACCC/C/2010/60.
7. The Applicant therefore contends that the acceptance of all of this by DEFRA illustrates the procedural shortcomings of challenges by third parties in contrast to the generous procedural regime enjoyed by Applicants by way of appeal against refusals of planning permission etc.
8. In the event that the Committee is minded to recommend any changes to the Judicial Review avenue of challenge for third party objectors, the Applicant wishes to draw the following issues to the Committee's attention.

9. In the event that a new *forum* for environmental challenges for third parties was to be set up, along the lines of the present Applicants' appeals to the Planning Inspector, the issue of an independent and impartial body" for the purposes of article 9.2 and "fair and equitable" for the purposes of article 9.4 may also arise.
10. The Applicant at the recent hearing before the Committee canvassed this issue, and counsel appearing for the United Kingdom didn't accept the Applicant's contentions.
11. The Applicant would contend that any alternative appeal or review procedure to a Planning Inspector or other tribunal should not be in the name of the Secretary of State.
12. The reason for this would be that as a Government Minister, on the objective test this might not be an "independent and impartial body" for the purposes of article 9.2 and be "fair and equitable" for the purposes of article 9.4 on an objective test.
13. It is contended that the same test would be that adopted by the European Court of Human Rights under article 6(1) of the ECHR.
14. It was also held in R. v. Secretary of State for the Home Dept. ex parte Anderson [2003] 1 A.C. 837 that the Secretary of State wasn't an "independent and impartial" tribunal to determine tariffs in homicide cases, and that this was in breach of article 6(1) ECHR, where the relevant Strasbourg jurisprudence was reviewed.
15. As a result, legislation was introduced that gave the power to fix tariffs to the trial judge, with a review to the High Court and Court of Appeal in order to satisfy the procedural guarantees of article 6(1) ECHR as incorporated under schedule 1 of the Human Rights Act 1998.
16. It is therefore contended that were any new tribunal for environmental appeals to be set up, the same principles would apply, with appointments of Inspectors being appointed by an independent appointments committee, as is currently now done with appointments of judges in England and Wales.
17. This would ensure that any environmental review tribunal was an "independent and impartial body" under article 9.2 and be "fair and equitable" under article 9.4 on an objective test that satisfied the Strasbourg jurisprudence.

(2.) Please provide a short description of the administrative or judicial procedures that are available to members of the public to raise the non-implementation of conditions on the execution of a project by way of the permit authorizing the project

1. The Communicant fully agrees with the submissions made by the Communicants in ACCC/C/2010/45 relating to the lack of public participation in the enforcement process.
2. Regarding DEFRA's contentions that the Committee shouldn't disturb the current procedures relating to the sole involvement of local authorities, in so far as it seeks to rely on the 1989 report of Robert Carnwarth, "Enforcing Planning Control", the Committee is urged not to take this into consideration.
3. That report was made well before the United Kingdom signed the Convention and so well pre-dates it and the United Kingdom's obligations under the Convention for the purposes of article 6 relating to "public participation in environmental decision making.
4. The Committee should therefore consider these issues independently of the previous report, which was written without the benefit of the Convention or any of its obligations.
5. It is therefore contended that Robert Carnwarth's report has now been overtaken by the implementation of the Convention and its obligations and cannot now be of any relevance to the issues presently being considered by the Committee.
6. However, the Communicant felt it right that the issue and context of Robert Carnwarth's report well pre-dating the Convention should be drawn to the Committee's attention and the Communicants in ACCC/C/2010/45, in view of the fact that DEFRA appear to be placing great weight on that report and the comments quoted at paragraph 10, pages 5-6 of DEFRA's letter.
7. The Communicant therefore has no further observations to make in relation to this issue or that of LIPS, as the Communicants in application ACCC/C/2010/45 have raised them, and these weren't a specific issue raised by the Communicant in application ACCC/C/2010/60.

Supporting documentation

"INDEPENDENT AND IMPARTIAL BODY"

1. R. v. Secretary of State for the Home Dept. *ex parte* Anderson [2003] 1 A.C. 837

Signed

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Dated 2 August 2012